Office - Supreme Court, U.S.
FILED
JAN 19 1984
STEVAS,
CLERK

No. 83-630

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

EFREM BERNAL,

Petitioner,

v.

JOHN W. FAINTER, JR., Secretary of State of the State of Texas, JOE RIVERA, County Clerk for Cameron County, Texas, and, SANTOS SALDANA, County Clerk for Hidalgo County, Texas,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

THOMAS SULLIVAN
DENIS A. DOWNEY

Downey & Sullivan
1185 F.M. 802, Suite 3
Brownsville, Texas 78520
(512) 544-0561

CORNISH F. HITCHCOCK
(Counsel of Record)
ALAN B. MORRISON
JOHN CARY SIMS

Public Citizen Litigation Group
Suite 700
2000 P Street, NW
Washington, D.C. 20036
(202) 785-3704

January 1984

Attorneys for Petitioner

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

QUESTION PRESENTED*

May a state constitutionally deny all resident aliens the opportunity to become notaries public, while under *In re Griffiths*, 413 U.S. 717 (1973), qualified resident aliens cannot be denied admission to the bar or be denied the right to administer oaths and perform other functions similar to those carried out by notaries public?

---

* In addition to the parties identified in the caption, Margarita M. Vargas was a plaintiff-appellee below. Pursuant to Rule 40.3 of the Rules of this Court, respondent John W. Fainter, Jr., Secretary of State of the State of Texas, is automatically substituted for his predecessor in office George W. Strake, Jr.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

REFERENCE TO OPINIONS 1

JURISDICTION 2

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

THE REQUIREMENT THAT NOTARIES PUBLIC BE UNITED STATES CITIZENS IS UNCONSTITUTIONAL AS A DENIAL OF THE EQUAL PROTECTION OF THE LAWS 7

A. The Applicable Legal Standard 7

B. The Texas Statute Cannot Withstand Strict Scrutiny under *In re Griffiths* 10

Page

C. The Court of Appeals Misapplied *Cabell* in Concluding that the Functions of Notaries Public Are "Political" and Thus Subject to a Less Demanding Standard of Review 15

D. There Is No Rational Relationship Between the Ban on Aliens Serving as Notaries Public and the Achievement of a Legitimate State Interest 21

CONCLUSION 23

TABLE OF AUTHORITIES

Cases: **Page**

Ambach v. Norwick,
441 U.S. 68 (1979).....9, 10, 16, 18-19, 21
Cabell v. Chavez-Salido,
454 U.S. 432 (1982).....*passim*
Cammer v. United States,
350 U.S. 399 (1956).....12
Cheng v. Illinois,
438 F. Supp. 917 (N.D. Ill. 1977).....13,14
Cohen v. Hurley,
366 U.S. 117 (1961).....11
Examining Board of Engineers, Architects and Surveyors v. Flores de Otero,
426 U.S. 572 (1976).....9, 10, 16
Foley v. Connelie,
435 U.S. 291 (1978).....9, 10, 16, 18-19, 21
Goldfarb v. Virginia State Bar,
421 U.S. 773 (1975).....11
Graham v. Ramani,
383 So. 2d 634 (Fla. 1980).....13
Graham v. Richardson,
403 U.S. 365 (1971).....7-8
In re Griffiths,
413 U.S. 717 (1973).....*passim*
Heim v. McCall,
239 U.S. 175 (1915).....8
Lawyers Surety Corp. v. Gulf Coast Investment Corp.,
410 S.W.2d 654 (Tex. Civ. App.), *writ of error refused,*
416 S.W.2d 779 (Tex. 1967).....14
Nyquist v. Mauclet,
432 U.S. 1 (1977).....9, 20
Patsone v. Pennsylvania,
334 U.S. 410 (1948).....8

Page

Perkins v. Smith,
426 U.S. 913 (1976), *aff'g mem.,*
370 F. Supp. 134 (D. Md. 1974)(three-judge court).....9
Plyler v. Doe,
457 U.S. 202 (1982).....8
In re Primus,
436 U.S. 412 (1978).....11
San Antonio Independent School District v. Rodriguez,
411 U.S. 1 (1973).....8
Skafte v. Rorex,
430 U.S. 961 (1977), *dismissing appeal from*
191 Colo. 399, 553 P. 2d 830 (1976).....9
Sugarman v. Dougall,
413 U.S. 634 (1973).....9, 10, 15, 18, 20
Taggart v. Mandel,
391 F. Supp. 732 (D. Md. 1975)
(three-judge court).....13,14
Takahaski v. Fish & Game Commission,
334 U.S. 410 (1948).....8
Terrace v. Thompson,
263 U.S. 197 (1923).....8
Truax v. Raich,
239 U.S. 33 (1915).....8
Vargas v. Strake,
710 F.2d 190 (5th Cir. 1983), *cert. granted,*
No. 83-630 (5 December 1983).....2
Yick Wo v. Hopkins,
118 U.S. 356 (1886).....8

United States Constitution:

Amendment XIV, § 1.....*passim*

Page

Federal Statutes:

28 U.S.C. § 1254(1) 3
28 U.S.C. § 1331 3
28 U.S.C. § 1343(a)(3) 3
28 U.S.C. § 1343(a)(4) 3

State Constitution:

Texas Constitution, Article IV, § 21 17

State Statutes:

Burns' Indiana Statutes Annotated
Section 33-16-2-5 (1975) 3
Connecticut General Statutes Revised
Section 51-85 11
Texas Revised Civil Statutes Annotated
Article 2321 17
Article 2324a(1) 17
Article 2324b(1) 17
Article 4331 17
Article 5949(2) ..... *passim*
Article 5949(3) 14, 17
Article 5949(5)(c) 14
Article 5949(5)(d) 14
Article 5949(7) 14
Article 5954 11
Article 5955 14
Article 5988 15

1979 Texas General and Special Acts, 66th Legislature, p. 2213, ch. 840, § 1, *codified at* Tex. Rev. Civ. Stat. Ann. art. 5949(3) (effective 1 January 1980) 4

Page

Other Authorities:

Mexico Notarial Law of 9 January 1932; Law of 30 December 1947, as amended by Decrees of 21 December 1950; 21 December 1965 and 26 December 1966, *summarized in* Mexico Law Digest, 7 *Martindale-Hubbell Law Directory* (1983).....14

Note, *A Dual Standard for State Discrimination Against Aliens,* 92 Harv. L. Rev. 1516 (1979).....8

R. Rothman, *Notary Public: Practices and Glossary* (1978).....3, 19

J. Vance and H. Claggett, *A Guide to the Law and Legal Literature of Mexico* (1945).....15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-630

EFREM BERNAL,

Petitioner,

v.

JOHN W. FAINTER, JR., Secretary of State of the State of Texas, JOE RIVERA, County Clerk for Cameron County, Texas, and, SANTOS SALDANA, County Clerk for Hidalgo County, Texas,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

REFERENCE TO OPINIONS

The unreported opinion of the United States District Court for the Southern District of Texas, Brownsville Division, is reproduced in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at pages 5a-13a. The judgment is reproduced at Pet. App. 14a.

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 15a-27a) is reported at 710 F.2d 190 (1983) under the name *Vargas v. Strake.*

JURISDICTION

The judgment of the court of appeals was entered on 25 July 1983 (Pet. App. 27a-28a). The petition for certiorari was timely filed on 14 October 1983 and was granted on 5 December 1983. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution, Section 1, states in pertinent part:

> . . . No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Texas Revised Civil Statutes Annotated article 5949(2) (1982) states in pertinent part:

> To be eligible for appointment as a Notary Public, a person shall be a resident citizen of the United States and of this state and at least eighteen(18) years of age . . ..

STATEMENT OF THE CASE

This case was filed as a class action on 5 July 1979 by Margarita M. Vargas, who was then a citizen of Mexico, to challenge the constitutionality of Tex. Rev. Civ. Stat. Ann. art. 5949(2) insofar as it requires a person to be a citizen of the United States in order to be eligible for appointment as a notary public in Texas. Jurisdiction was properly based on 28 U.S.C. §§ 1331, 1343(a)(3) and (4).

When the complaint was filed, Vargas was a lawful resident alien who worked as a secretary/receptionist in a real estate office in Brownsville. She wished to become a notary public so that she could administer oaths and take sworn statements from clients of her office. While the case was pending in district court, she became a United States citizen and therefore became eligible to become a notary public. This case is thus moot as to her (Pet. App. 3a).

Petitioner Efrem Bernal, a native of Mexico, was added as a plaintiff in the district court (Pet. App. 16a). He is a lawful resident alien who has been living in the United States since 1961. *Id.; see also* Deposition of Efrem Bernal ("Bernal Deposition"), filed in district court, at 8. After his arrival in this country, he attended public schools in Texas and graduated from high school there (Pet. App. 2a). From 1974 to 1978 he was employed in a migrant legal services program in Indiana, and during those four years he held a commission as a notary public in that state (Pet. App. 2a.)[1] Since 1978 he has been employed as a paralegal by Texas Rural Legal Aid, Inc. in Edinburg (Pet. App. 2a; Bernal Deposition at 19), where he works exclusively with migrant farm workers on employment and civil rights issues (Bernal Deposition at 6). His job requires that he go into the fields and interview 15 to 50 farm workers a month (*id.* at 12-13). On an average of two to four times each month, he needs to obtain sworn statements from these workers for use in civil litigation (*id.* at 13). He wants to become a notary public because it is "very hard and inconvenient to get one of the other paralegals to go out with me to just get an affidavit or statement notarized" (*id.* at 8; *see also* Pet. App. 3a-4a).[2]

[1] The Indiana notary statute under which Mr. Bernal was commissioned during this period embraces all the functions which he would perform as a Texas notary. *See* Burn's Ind. Stat. Ann. § 33-16-2-5 (1975).

[2] Mr. Bernal's situation recalls one of the historical reasons why the authority of notaries to serve the public was expanded. "In the 1800's, it was not always possible to take the testimony of a witness in a courtroom. Transportation was slow and witnesses were often incapable of making an appearance for reasons of distance or, in some cases, health. Therefore, Notaries Public were empowered to take depositions." R. Rothman, *Notary Public: Practices and Glossary* 3-4 (1978).

Respondent John W. Fainter, Jr. is Secretary of State of the State of Texas and is automatically substituted for his predecessor, George W. Strake, Jr., pursuant to Rule 40.3 of the Rules of this Court. Respondents Joe Rivera and Santos Saldana are the county clerks for Cameron County (where Mrs. Vargas resides) and Hildago County (where Mr. Bernal resides), respectively. The respondents will be referred to collectively in this brief as the "State of Texas" or the "State." At the time that this suit was filed, the Texas notary public statute required applicants to submit a standardized form to the local county clerk, who then forwarded it to the Secretary of State for consideration (Pet. App. la). Since then, the statute has been amended to make the Secretary of State solely responsible for processing such applications. *See* 1979 Tex. Gen. and Special Acts, 66th Legis., p. 2213, ch. 840, § 1, *codified at* Tex. Rev. Civ. Stat. Ann. art. 5949(3)(effective 1 January 1980).

In October 1978, petitioner applied to become a notary public in Texas, but his application was denied (Pet. App. 2a-3a). He appealed that decision and was given an administrative hearing, but the denial was upheld on the sole ground that he was ineligible for appointment as a notary public because of the citizenship requirement in Tex. Rev. Civ. Stat. Ann. art. 5949(2)(Pet. App. 3a).

In district court, the request for class relief was abandoned (Pet. App. 5a), and the request of Mrs. Vargas and Mr. Bernal for declaratory and injunctive relief was submitted on the basis of stipulated facts (Pet. App. 1a- 4a). On 9 October 1981 the district court declared that the citizenship requirement of Tex. Rev. Civ. Stat. Ann. art. 5949(2) was unconstitutional as a denial of the equal protection of the laws, and the court enjoined respondents from refusing to consider the applications of Mrs. Vargas and Mr. Bernal to become notaries public (Pet. App. 9a-11a).

The State appealed, and the court of appeals reversed in an opinion by Judge Reavley in which Judge Politz joined (Pet. App. 15a-24a). The court held that the statute did not violate equal protection guarantees because, under this Court's opinion in *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982), the citizenship requirement "bears a rational relationship to the state's interest in the proper and orderly handling of a countless variety of legal documents of importance to the state" (Pet. App. 24a). Judge Ingraham dissented (Pet. App. 24a-27a). In his view, the majority had misread *Cabell*, and the case was controlled by *In re Griffiths*, 413 U.S. 717 (1973), which invalidated a ban on the admission of aliens to the Connecticut bar (Pet. App. 25a). In particular, he noted that "the authority accorded Connecticut lawyers encompasses every function performed by Texas notaries public" (Pet. App. 25a), and he would have affirmed on that basis. Mr. Bernal then sought and obtained review by this Court.

SUMMARY OF ARGUMENT

The judgment of the court of appeals should be reversed because it conflicts with *In re Griffiths*, 413 U.S. 717 (1973), which employed strict scrutiny analysis in striking down a court rule requiring United States citizenship as a condition for being admitted to a state bar. In *Griffiths*, this Court confronted arguments similar to those advanced by the State here, *i.e.*, that lawyers play such an important role in the smooth functioning of state government that the citizenship requirement should be upheld. In rejecting these arguments and holding the rule unconstitutional, the Court stated that "the status of having a license to practice law [does not] place one so close to the core of the political process as to make him a formulator of government policy," *id.* at 729 (footnote omitted).

Especially relevant here is the fact that the functions performed by Texas notaries are indistinguishable from certain notarial functions entrusted to Connecticut lawyers in *Grif-*

fiths. In language which controls the outcome here, *Griffiths* stated that "the powers 'to sign writs and subpoenas, take recognizances, [and] administer oaths' hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens." 413 U.S. at 724. In light of the similarities between *Griffiths* and the present case, the Texas statute cannot withstand strict scrutiny.

The court of appeals failed to analyze *Griffiths,* relying instead on this Court's opinion in *Cabell v. Chavez-Salido,* 454 U.S. 432 (1982), which stated that strict scrutiny was not to be utilized in cases where a restriction applies to sensitive posts in state or local government and thus serves "political" interests, rather than "economic" interests, as in *Griffiths.* The court of appeals concluded that the Texas statute served "political" interests and upheld the citizenship requirement as being rationally related to the State's interest in assuring that documents are properly notarized and oaths properly administered.

In reaching this conclusion, however, the court of appeals misapplied *Cabell*'s two-part test for determining which functions should be deemed "political." The court found that the Texas statute was not "substantially overinclusive or underinclusive" (454 U.S. at 440) within the meaning of the first prong of *Cabell,* because the restriction applied only to notaries public. However, the statute is overinclusive because, as in *Griffiths,* it excludes qualified aliens, such as petitioner, who was a notary in Indiana for four years. The restriction is fatally underinclusive as well, since Texas has established no citizenship requirement for court reporters, even though they too are licensed by the State and are allowed to administer oaths. Nor does Texas require citizenship of its Secretary of State, the highest appointed official in Texas, who performs many important functions, including licensing notaries.

The court of appeals also found that the statute met the second prong of *Cabell,* because it covered persons holding

"important nonelective" positions. *Id.* This conclusion is incorrect because notaries perform essentially ministerial functions and do so while engaged in a private occupation. This case is thus unlike those cases in which restrictions have been deemed "political" because they denied aliens the right to exercise important state functions as employees of a state or local government.

Finally, even if the Texas statute were to be deemed to involve "political" functions, it is still unconstitutional because there is no rational relationship between the blanket exclusion of aliens and achieving the State's goal of having documents properly notarized and oaths properly administered. The restriction is not rational in light of the types of positions which aliens are allowed to hold in Texas state government, as discussed *supra.* In addition, the State has enacted various regulations which should assure that notaries perform their functions properly, regardless of citizenship.

ARGUMENT

THE REQUIREMENT THAT NOTARIES PUBLIC BE UNITED STATES CITIZENS IS UNCONSTITUTIONAL AS A DENIAL OF THE EQUAL PROTECTION OF THE LAWS.

A. The Applicable Legal Standard.

Over the past decade, this Court has considered a number of equal protection challenges to state restrictions on lawful resident aliens. In *Graham v. Richardson,* 403 U.S. 365 (1971), the Court held that a state could not distinguish between lawful resident aliens and citizens in distributing welfare benefits without meeting a very heavy burden of justification:

> [C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.

> Aliens as a class are a prime example of a "discrete and insular" minority (*see United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 n.4 (1938)) for whom such heightened judicial solicitude is appropriate.

403 U.S. at 372 (footnotes omitted).[3]

This strict scrutiny of classifications involving aliens has been employed in various contexts because aliens, like certain other groups in our society, "have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982), *quoting San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973). *See* Note, *A Dual Standard for State Discrimination Against Aliens*, 92 Harv. L. Rev. 1516, 1525 (1979).

Following *Graham*, the Court has applied strict scrutiny to state laws which disadvantaged aliens economically by

---

[3] In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court first held that resident aliens may rely upon the equal protection clause of the Fourteenth Amendment. It concluded that a state could not deny aliens the right to carry on a "harmless and useful occupation" that may be performed by citizens, *id.* at 374, in that case the operation of commercial laundries. *Accord, Truax v. Raich*, 239 U.S. 33 (1915)(invalidating statute requiring private employers to hire a certain percentage of "qualified electors or native-born citizens").

The early decisions of the Court thus showed a willingness to intervene when state laws restricted purely private employment opportunities. However, the Court declined to strike down restrictions denying aliens the right to enjoy public benefits, reasoning that a state could properly limit to its citizens the enjoyment of scarce public resources. *See, e.g., Terrace v. Thompson*, 263 U.S. 197 (1923) (ownership of land); *Heim v. McCall*, 239 U.S. 175 (1915)(employment on public works projects); *Patsone v. Pennsylvania*, 232 U.S. 139 (1914)(taking of wild game).

The notion that a state has a "special public interest" in preserving certain benefits or resources for its citizens was undercut in *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), which invalidated a California law denying commercial fishing licenses to persons "ineligible to citizenship." The "special public interest" doctrine was effectively laid to rest in *Graham v. Richardson*.

depriving them of employment opportunities and of some state benefits. Thus, the Court has struck down state laws denying aliens admission to a state bar, *In re Griffiths,* 413 U.S. 717 (1973); jobs in a state's civil service, *Sugarman v. Dougall,* 413 U.S. 634 (1973); a license as a civil engineer, *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero,* 426 U.S. 572 (1976); and eligibility to receive a state scholarship for higher education, *Nyquist v. Mauclet,* 432 U.S. 1 (1977).

The Court has, however, carved out an exception to this general rule of strict scrutiny when state laws prevent aliens from holding sensitive posts in state or local government. Thus, even though a wholesale ban on aliens holding civil service posts was struck down in *Sugarman v. Dougall, supra,* this Court stated that a less demanding standard would be applied to narrower classifications involving "persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy functions that go to the heart of representative government." 413 U.S. at 647. If a classification involves such an important post, the state needs "to justify its classification only 'by a showing of some rational relationship between the interest sought to be protected and the limiting classification.'" *Ambach v. Norwick,* 441 U.S. 68, 74 (1979), *quoting Foley v. Connelie,* 435 U.S. 291, 296 (1978). The Court has applied this less rigorous standard to classifications which barred aliens from serving as police officers, *Foley v. Connelie, supra;* public school teachers, *Ambach v. Norwick, supra;* and peace officers, *Cabell v. Chavez-Salido, supra,* and has upheld the restriction in each case under this "rational relationship" test.[4]

---

[4] In addition, aliens have been excluded from voting in local elections, *Skafte v. Rorex,* 430 U.S. 961 (1977), *dismissing appeal from* 191 Colo. 399, 553 P.2d 830 (1976), and from serving on grand and petit juries, *Perkins v. Smith,* 426 U.S. 913 (1976), *aff'g mem.,* 370 F. Supp. 134 (D. Md. 1974)(three-judge court).

In *Cabell v. Chavez-Salido, supra,* the Court summarized the evolution of the law in this area and articulated a two-step standard for use in determining whether strict scrutiny should not be employed because a restriction on aliens falls within the *Sugarman* exception and serves what the Court termed "political" ends, as in *Foley* and *Ambach,* rather than "economic" goals, as in *Griffiths, Sugarman* and *Flores de Otero.* 454 U.S. at 438-39. First, a classification that is "substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends." *Id.* at 440. Second, even if a classification is "sufficiently tailored," it may be applied only to officials holding "important" positions of the sort specified in the *Sugarman* exception. *Id.* Thus, a court must "inquire whether the 'position in question . . . involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community.'" *Id.* at 440-41, *quoting Foley v. Connelie, supra,* 435 U.S. at 296.

In the balance of this brief, we will first demonstrate why the restriction in this case is so similar to the restriction invalidated under strict scrutiny analysis in *In re Griffiths, supra,* that *Griffiths* is controlling. We will then demonstrate how this result is consistent with *Cabell* and how the court of appeals misapplied *Cabell* in concluding that this classification served "political" ends and was therefore subject to less searching review than strict scrutiny. Finally, we will demonstrate why, even if the Texas classification is considered to be "political," there is no rational relationship between the restriction and the state interests sought to be protected.

B. The Texas Statute Cannot Withstand Strict Scrutiny Under *In re Griffiths.*

The judgment of the court of appeals should be reversed because it squarely conflicts with *In re Griffiths,* in which this

Court invalidated a Connecticut court rule barring aliens from admission to the state bar. The Court found that the citizenship requirement could not withstand strict scrutiny because the functions of lawyers "hardly involve matters of state policy or acts of such major responsibility as to entrust them only to citizens." 413 U.S. at 724.

In reaching its decision, the Court recognized that lawyers "occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts." *Id.* at 729. *Accord, Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975) ("lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'"), *quoted in In re Primus,* 436 U.S. 412, 422 (1978). *See also Cohen v. Hurley,* 366 U.S. 117, 123-24 (1961). The Court nonetheless held that "the status of holding a license to practice law [does not] place one so close to the core of the political process as to make him a formulator of government policy," *Griffiths, supra,* 413 U.S. at 729 (footnote omitted).

What is especially significant for the present case is the fact that the functions performed by Texas notaries are indistinguishable from the functions performed by Connecticut lawyers as Commissioners of the Superior Court, an office to which they are automatically appointed upon admission to the bar. In that capacity, they are empowered to "sign writs and subpoenas, take recognizances, administer oaths and take depositions and acknowledgements of deeds." Conn. Gen. Stat. Rev. § 51-85. Similarly, Texas notaries public "have the same authority to take acknowledgements or proofs of written instruments, protest instruments permitted by law to be protested, administer oaths, and take depositions as is now or may hereafter be conferred by law upon County Clerks." Tex. Rev. Civ. Stat. Ann. art. 5954. In light of these similarities and the fact that *Griffiths* was recently reaffirmed in *Cabell, supra,* 454 U.S. at 439, the State has the burden of showing how it can be constitutionally improper to require citizenship

for lawyers, but proper to require it for notaries. This the State has failed to do.

In defending its restriction in *Griffiths*, the State of Connecticut advanced an argument about the importance of lawyers which is similar to that raised by the State of Texas regarding notaries (*see* Brief in Opposition at 4-5) — that a lawyer is a public official "who acts by and with the authority of the State" and who is entrusted with "the exercise of actual government power," 413 U.S. at 728. In particular, Connecticut argued that its legislature had given concrete meaning to the claim that lawyers are "officers of the court" by appointing them as Commissioners of the Superior Court. *Id.* The fact that lawyers hold this office was not enough, however, to sustain the citizenship requirement in *Griffiths*. In language which is pertinent here, this Court stated:

> It in no way denigrates a lawyer's high responsibilities to observe that the powers "to sign writs and subpeonas, take recognizances, [and] administer oaths" *hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens.*

413 U.S. at 724 (emphasis added).

The Court emphasized that "a lawyer is not an officer in the ordinary sense," for unlike marshals, bailiffs, court clerks or judges, who are employed by the government, "a lawyer is engaged in a private profession, important though it be to our system of justice." *Id.* at 728-29, *quoting Cammer v. United States*, 350 U.S. 399, 405 (1956). In addition, people do not become "officials of government by virtue of being lawyers." *Id.* at 729. This reasoning applies with equal force to notaries, who, like lawyers, are licensed to perform certain functions, but who generally do so while privately employed.

Nor was the *Griffiths* Court persuaded that the restriction was valid because aliens might somehow be disloyal to the United States. Noting that attorneys must take an oath to support the United States and state constitutions, *id.* at 725-26, and are subject to "continuing scrutiny by the organized bar and the courts," *id.* at 727, the Court concluded that "the practice of law [does not offer] meaningful opportunities adversely to affect the interest of the United States. Certainly the Committee has failed to show the relevance of citizenship to any likelihood that a lawyer will fail to protect faithfully the interest of his clients." *Id.* at 724 (footnote omitted).

Griffiths controls the outcome here. Certainly, if citizenship is not required in order to practice law, it should not be required in order to be a notary. Indeed, accepting the State's argument would result in a curious anomaly: an alien admitted to practice law in Texas could draft contracts, wills, deeds and other important legal documents, but could not notarize them. Such a result would make no sense, especially since the lawyer who drafts (or errs in drafting) a will or a deed has a far more significant impact on the public and the "orderly processing of a countless variety of legal documents" (Pet. App. 24a) than the notary who simply attests to the signature.

Curiously, the court of appeals failed to discuss *Griffiths* and merely cited the case in a footnote (Pet. App. 20a n.3). Nor did the court mention three decisions which followed *Griffiths* in striking down citizenship requirements for notaries in Florida, Illinois and Maryland. *See Graham v. Ramani,* 383 So. 2d 634 (Fla. 1980); *Cheng v. Illinois,* 438 F. Supp. 917 (N.D. Ill. 1977); *Taggart v. Mandel,* 391 F. Supp. 732 (D. Md. 1975)(three-judge court). As the foregoing discussion suggests, however, *Griffiths* cannot be sidestepped so easily.

Applying the strict scrutiny analysis of *Griffiths* to the Texas statute at issue here dictates a finding of unconstitutionality. There is no evidence in the record that lawful resi-

dent aliens, as a class, are so untrustworthy, incompetent or otherwise handicapped by their foreign citizenship that they must be denied the opportunity to administer oaths, witness signatures and perform the other functions carried out by notaries public for those who wish to utilize their services. As the Court recognized in *Griffiths*, "the possibility that some resident aliens are unsuited to the practice of law [cannot] be a justification for a wholesale ban," 413 U.S. at 725.[5]

This is not to say that a state is powerless to regulate the qualifications and performance of notaries public. Just as was true of Connecticut lawyers in *Griffiths*, a state "has wide freedom to gauge on a case-by-case basis the fitness of an applicant" for a particular post and to "require appropriate training and familiarity with state laws." *Id.* In fact, Texas has imposed a number of regulations on persons who wish to be licensed as notaries. Tex. Rev. Civ. Stat. Ann. art. 5949(3). For example, as a means of assuring loyality to the United States, as well as faithful performance once in office, Texas notaries public take an oath of office and execute a bond of $2500 (art. 5949(7)). So that their activities can be monitored, they are required to maintain a record book, which is available for public inspection (art. 5955). In addition, they are subject to civil liability for damages for any derelictions of their official duties. *See Lawyers Surety Corp. v. Gulf Coast Investment Corp.*, 410 S.W.2d 654 (Tex. Civ. App.), *writ of error refused*, 416 S.W.2d 779 (Tex. 1967).[6]

---

[5] Ironically, petitioner was commissioned as a notary public by the State of Indiana and held that post during the four years he lived there (Pet. App. 2a).

[6] As another form of consumer protection, Texas notaries who advertise their services in Spanish cannot describe themselves as "Notario Publico" or represent that they can give legal advice (art. 5949(5)(c)). The purpose of this law is to prevent people from thinking that a Texas notary is comparable to a Notario Publico in Mexico, who must be trained in the law and can not only witness legal documents, but can draft them as well. Violation of this disclosure requirement is punishable as an unfair trade practice (art. 5949(5)(d)). *See* Mexico Notarial Law of 9 January 1932; Law of 30 December 1947, as amended by Decrees of 21 December 1950; 21 December 1965 and 26 December 1966, *summarized in* Mex-

Finally, notaries are automatically removed from office if they are convicted of "any willful neglect of duty or official misconduct" (art. 5988). *See generally Taggart v. Mandel, supra,* 391 F. Supp. at 740; *Cheng v. Illinois, supra,* 438 F. Supp. at 918 n.4. These regulations are less onerous than a total ban and are more than sufficient to assure that only a qualified person can become and remain a Texas notary public, regardless of citizenship.

C. The Court of Appeals Misapplied *Cabell* in Concluding that the Functions of Notaries Public Are "Political" and Thus Subject To a Less Demanding Standard of Review.

The court of appeals relied heavily upon *Cabell* in concluding that the citizenship requirement for Texas notaries was "political" rather than "economic" in nature and thus subject to a less rigorous standard of review. However, *Cabell* confirms that strict scrutiny should be applied here. Before turning to a specific discussion of *Cabell* and how the court of appeals misapplied its two-part standard for determining which state functions are "political," several preliminary observations are warranted.

Sugarman stated that a less demanding standard of review was to be the exception to the general rule of strict scrutiny for classifications involving aliens and was to be used in those cases involving "elective or important nonelective executive, legislative and judicial positions," for officers "who participate directly in the formulation, execution, or review of broad public policy," 413 U.S. at 647. While *Cabell* did not speak in terms of "political" functions being an exception to the category of "economic" functions, the opinion in no way expanded the definition of what is "political" and expressly endorsed the quoted language from *Sugarman* as the governing standard. 454 U.S. at 440.

---

ico Law Digest, p. 16, 7 *Martindale-Hubbell Law Directory* (1983). *See generally* J. Vance and H. Clagett, *A Guide to the Law and Legal Literature of Mexico* 62-66 (1945).

It is particularly important not to give an expansive interpretation to what constitutes a "political" function of state government when, as here, the restriction does not apply to state employees. In cases where this Court has declined to apply strict scrutiny analysis, the jobs in question all involved positions on a government payroll: public school teachers, *Ambach v. Norwick, supra,* policemen, *Foley v. Connelie, supra,* or peace officers, *Cabell v. Chavez-Salido, supra.*

When restrictions apply to resident aliens as private individuals, however, strict scrutiny analysis has been utilized, even when the jobs could affect the public. Thus, in *Griffiths,* this Court distinguished between lawyers, who are officers of the court, though engaged in a private occupation, and other court officers, such as bailiffs, marshals and judges, who are full-time government officials. 413 U.S. at 728. This "distinction between a private occupation and a government function" was also highlighted in *Ambach v. Norwick, supra,* 441 U.S. at 76 n.6, which noted that the restriction in *Griffiths,* like the one at issue here, "applied to all attorneys, most of whom do not work for the government." *Id.* By contrast, the restriction on teachers in *Ambach* applied "only to teachers employed by and acting as agents of the State" and not to private school teachers. *Id.* While we do not suggest that the "economic" versus "political" functions dichotomy of *Cabell* should be replaced by a "private" versus "public" employment distinction, the latter is useful in determining which functions are "political" and which are not. Since notaries, like lawyers, generally perform functions licensed by the state while privately employed, this distinction helps place the Texas restriction in the same category as *Griffiths, Sugarman* and *Flores de Otero.*

Turning to *Cabell's* two-part standard for determining which state functions are "political," the court of appeals determined that this restriction satisfied the first prong, *i.e.*, it

was not "substantially overinclusive or underinclusive," 454 U.S. at 440, because it applied only to notaries public (Pet. App. 21a-22a). This conclusion is erroneous because the restriction fails on both counts. It is overinclusive because it denies a commission to qualified aliens such as petitioner, who was a notary public in Indiana for four years (Pet. App. 2a). It is also underinclusive since Texas court reporters, like notaries, are licensed by the State, Tex. Rev. Civ. Stat. Ann. art. 2324b(1), they are officers of the State (art. 2321), and they administer oaths and take depositions (art. 2324a(1)), yet they are not required to be citizens. Nor does Texas require that its Secretary of State be a United States citizen, Tex. Const. art. IV, § 21, even though he or she holds the highest appointive office in the State and performs many important functions, Tex. Rev. Civ. Stat. Ann. art. 4331, including supervision of the licensing of all notaries public (art. 5949(3)). Affirming the court of appeals in this case would produce a striking anomaly, since Mr. Bernal could be appointed as Secretary of State and thus decide which persons are qualified to serve as notaries public, even though he could not hold such a commission himself. Thus, it cannot be said that the classification involving notaries is "sufficiently tailored" wihin the meaning of *Cabell.* If anything, Texas has "indiscriminately swept in menial occupations, while leaving out some of the State's most important political functions," *Cabell v. Chavez-Salido, supra,* 454 U.S. at 440.

The Texas statute also fails to meet the second prong of the *Cabell* test, because notaries do not hold such an "important nonelective" post that they "participate directly in the formulation, execution, or review of broad public policy." *Id.* The court of appeals decided that this standard had been met largely because of the role played by notaries in acknowledging signatures and administering oaths on legal papers, as well as the deference and presumption of regularity which are given to notarized documents (Pet. App. 23a).

The principal problem with this analysis is that the functions performed by a notary public, which the majority found to be important in the smooth functioning of government, are "clerical" and "purely ministerial" in nature, as Judge Ingraham pointed out in dissent (Pet. App. 26a). Even the court of appeals' majority acknowledged that a notary is called upon simply to ensure that "those persons executing documents are accurately identified, to refuse to certify any identification that is false or uncertain and to insist that oaths are properly and accurately administered" (Pet. App. 23a). In carrying out those functions, important though they may be to the orderly processing of legal douments, it cannot be said that notaries are "performing a task 'that go[es] to the heart of representative government,'" *Ambach v. Norwick, supra,* 441 U.S. at 75-76, *quoting Sugarman v. Dougall, supra,* 413 U.S. at 647.

The essentially ministerial functions performed by notaries are thus worlds apart from the functions performed by state employees in those cases which have held that restrictions on aliens served "political" ends. For example, notaries public cannot make arrests or recommend revocation of an individual's liberty, as could the policemen in *Foley* and the deputy probation officers in *Cabell,* who exercise the coercive power of the state. Nor are the functions of notaries comparable to the responsibilities of public school teachers, who are charged with inculcating in young children "fundamental values necessary to the maintenance of a democratic political system," *Ambach v. Norwick, supra,* 441 U.S. at 77. While notaries do facilitate the carrying out of routine legal transactions, surely it cannot be said that by attesting to a signature on a deed or by swearing in a witness at a deposition, a notary is performing functions that are "so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government." *Id.* at 73-74.

Cabell specified that "political" functions must involve "discretionary decisionmaking, or execution of policy, which substantially affects members of the political community." *Id.* at 440-41, *quoting Foley v. Connelie, supra,* 435 U.S. at 296. However, as Judge Ingraham's dissent correctly points out, the majority opinion read this language as asking whether a notary public exercises *any* discretion in performing his or her duties, rather than whether the exercise of that discretion "would reveal a governing role" (Pet. App. 26a).

The court of appeals concluded that this standard had been met because notaries "are involved in countless matters of importance to the day-to-day functions of state government" (Pet. App. 23a). However, giving aliens discretion to notarize a will is not on a par with giving aliens the discretion to make an arrest or to decide how to teach American history to school children, as was the situation in *Foley* and *Ambach,* respectively. Indeed, *Cabell* expressly cautioned that its standard should not be broadly interpreted, since "almost any government official can be understood as participating in the execution of broad public policies." 454 U.S. at 441 n.7. Thus, if the court of appeals' analysis is followed, and notaries are found to be operating at "the heart of representative government," *id.* at 440, then it is hard to imagine what state function would not qualify as being so "important" that discrimination against resident aliens could be judged under the less demanding standard of review. In effect, what began in *Sugarman* as an exception to the general rule of strict scrutiny will have swallowed the rule whole.[7]

---

[7] Also undermining the State's position that notaries serve a sensitive "political" role in state government is the fact that there are so many of them. In 1977, the last year for which published figures are readily available, Texas had 240,000 notaries — more than any other state. R. Rothman, *supra* note 2, at 181. According to the Secretary of State's office, that number has grown to 358,293 as of 30 November 1983, and thus there are more notaries in Texas than there are residents of Austin, the state capital (1980 population 345,496).

Finally, the State's argument that its statute serves "political" rather than "economic" ends relies heavily on the fact that petitioner is not required to become a notary public in order to keep his current job (Bernal Deposition at 8). *See* Brief in Opposition at 3. What the State seems to be arguing is that if the identifiable economic effects of a citizenship requirement are minimal, then the restriction comes within the "political" category. Neither *Cabell* nor any earlier case supports such an interpretation, and reliance on petitioner's current employment situation misses the point. Even though Mr. Bernal will not be fired if he loses this case, the Texas statute makes him ineligible for future paralegal jobs which may require him to be a notary public. In addition, the Texas statute can adversely affect other aliens in their quest for employment. For example, an employer may not explicitly require an applicant for a secretarial or a paralegal post to be a notary public. However, if there are two applicants who are otherwise equally qualified, one of whom is a notary and one of whom is not, the employer may, quite sensibly, choose the former applicant.[8]

---

[8] Taken to its logical conclusion, the State's reliance on this factor would seem to suggest that strict scrutiny is limited to those situations in which a restriction totally denies a lawful alien the ability to earn a livelihood in a given field. Support for such an interpretation is not to be found in the case law, however, and several examples will illustrate the point.

A restriction on an alien's ability to apply for a state scholarship does not mean that he or she will be automatically denied a college education, since other scholarships may be available. Similarly, even if an alien cannot be employed in a state's civil service as a typist or senior clerk, that does not mean that he or she lacks other job opportunites in this line of work. Finally, a resident alien may be able to pursue a career as a law professor without being a member of a state bar. That does not mean, however, that a restriction on practicing law would have no "economic" consequences, since the professor may decide to leave academia and represent private clients or seek to supplement his or her law school salary with outside work. Yet in each of these instances, this Court has determined that restrictions on lawful aliens fall on the "economic" rather than the "political" side of the equation and has judged the restriction under strict scrutiny analysis. *See Nyquist v. Mauclet, supra; Sugarman v. Dougall, supra; In re Griffiths, supra.* The same reasoning should apply here as well.

For these reasons, *Cabell* and the similar cases bolster petitioner's argument that the Texas statute should be judged under strict scrunity analysis, and the court of appeals misapplied *Cabell* in concluding that the statute involved "political" goals. In the next portion of this brief, we shall demonstrate why, even if the statute is judged under the less demanding "rational relationship" test, it is still unconstitutional.

D. There Is No Rational Relationship Between the Ban on Aliens Serving as Notaries Public and the Achievement of a Legitimate State Interest.

This Court has stated that, when a state classification involves a sensitive government position, a court should only inquire whether there is a "rational relationship between the interest sought to be protected and the limiting classification." *Ambach v. Norwick, supra,* 441 U.S. at 74, *quoting Foley v. Connelie, supra,* 435 U.S. at 296. In concluding that this standard had been satisfied, the court of appeals stated: "The citizenship restriction in art. 5949(2) bears a rational relationship to the state's interest in the proper and orderly handling of a countless variety of legal documents of importance to the state" (Pet. App. 24a). This analysis is simply not enough to support the State's argument.

Petitioner acknowledges that a state may take steps to assure that only those people who are trustworthy and who understand the legal significance of a notary's duties are commissioned, thereby facilitating the execution and processing of legal documents and ultimately the smooth operation of state government. But pointing to the importance of a notary's function does not end the analysis. Instead, the State must go further and demonstrate how its goal of orderly execution and processing of notarized documents is rationally advanced by the blanket exclusion of all lawful resident aliens who are otherwise qualified to become notaries. This the State has failed to do. There is no evidence that aliens are so

incompetent or untrustworthy that, notwithstanding the regulations the State has imposed on notaries (*see* pp. 14-15, *supra*), a wholesale ban is reasonable in order to prevent an unacceptable increase in the number of legally defective documents.

Nor can the state's classification be regarded as a rational way of achieving a goal of efficient state operations when one recalls that Texas allows aliens to serve as official court reporters who, like notaries, administer oaths and apparently do so in a way that does not disrupt the judicial process. And if the state believes that allowing aliens to serve as notaries would disrupt the smooth functioning of state government, it is hard to understand why it has imposed no citizenship restriction on its Secretary of State, even though he or she performs many important state functions, including the licensing of notaries public. Even if the Court should conclude that this case involves a "political" rather than an "economic" classification, the State has failed to meet its burden under the "rational relationship" standard, and the statute cannot stand.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and remanded with instructions to reinstate the judgment of the district court.

Respectfully submitted,

CORNISH F. HITCHCOCK
(Counsel of Record)
ALAN B. MORRISON
JOHN CARY SIMS

Public Citizen Litigation Group
Suite 700
2000 P Street, NW
Washington, D.C. 20036
(202) 785-3704

THOMAS SULLIVAN
DENIS A. DOWNEY

Downey & Sullivan
1185 F.M. 802, Suite 3
Brownsville, Texas 78520
(512) 544-0561

Attorneys for Petitioner

January 1984